

² Appellant timely requested an oral argument before the Board pursuant to the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated May 8, 2017, the Board denied the request for oral argument as the issue on appeal could be fully addressed on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0213 (issued May 8, 2017).

FACTUAL HISTORY

On February 23, 2012 appellant, then a 63-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she suffered an injury to her left shoulder and rotator cuff as a result of sweeping bins of letters into trays while working the all-purpose container (APC) machine eight hours a day during Christmas season. On March 7, 2012 OWCP accepted appellant's claim for left supraspinatus tear and left bicipital tenosynovitis. Appellant received wage-loss compensation and medical benefits on the periodic rolls as of May 6, 2012.

On April 19, 2012 Dr. Rena Amro, a Board-certified orthopedic surgeon, performed authorized arthroscopy of the left shoulder, Bakart repair, superior labrum anterior and posterior debridement, removal of loose body, extensive synovectomy, glenoid debridement subacromial decompression, distal clavicle resection, arthroscopic rotator cuff repair, and coracoacromial ligament release.

Dr. Amro continued to submit medical reports documenting appellant's progress. In a November 14, 2012 report, she diagnosed left shoulder pain, left biceps tenosynovitis, supraspinatus articular surface partial tear, acromioclavicular arthropathy, and right shoulder pain. Dr. Amro prescribed medication, therapy, and activity restrictions. Under a section labeled "Plan," she noted that she discussed activity restrictions at length with appellant, but also noted a plan to return to work with no restrictions four hours a day.

On November 16, 2012 OWCP referred appellant to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, for a second opinion regarding appellant's disability status. Dr. Millheiser submitted a December 3, 2012 report, a work capacity evaluation dated December 19, 2012, and an addendum report dated May 10, 2013. He discussed his December 3, 2012 examination of appellant and reviewed appellant's medical record. In a December 19, 2012 work capacity evaluation, Dr. Millheiser indicated that appellant had permanent restrictions of four hours of pushing and lifting 10 pounds and no pulling.

On July 17, 2013 OWCP sent Dr. Amro a copy of the reports of Dr. Millheiser and asked for comments. Dr. Amro did not respond.

On August 12, 2013 the employing establishment offered appellant a position as a modified full-time mail handler. The position included restrictions of no pulling, pushing, or lifting more than 10 pounds for four hours a day. OWCP reviewed the job offer and found it in accordance with the limitations set forth by Dr. Millheiser on December 19, 2012. In a memorandum to file dated August 29, 2013, it indicated that the weight of the medical evidence rested with the December 3, 2012 opinion of Dr. Millheiser.

By letter dated December 19, 2013, OWCP determined that the weight of the evidence indicated that the offered position was suitable and gave appellant 30 days to accept the job without penalty. It noted that, if appellant failed to accept position, she must provide a written explanation of reasons within the allotted time period.

On January 14, 2014 appellant refused the job offer and indicated "retired injured."

On January 27, 2014 OWCP informed appellant that her reason for not accepting the job was not valid and that she had 15 additional days to accept and report to the position.

A telephone memorandum of February 3, 2014 documents that appellant advised OWCP that she had retired as of August 31, 2012 and had received a buy-out. Appellant also noted that she had requested an election of Office of Personnel Management (OPM) benefits.

On February 18, 2014 OWCP terminated appellant's entitlement to wage loss and any schedule award effective February 18, 2014 for refusal of suitable work, pursuant to 5 U.S.C. § 8106(c)(2). It noted that this decision did not affect appellant's entitlement to medical benefits.

Appellant requested a hearing before an OWCP hearing representative on December 4, 2015. In a December 1, 2015 statement, she disagreed with the decision on her claim. Appellant argued that Dr. Millheiser's opinion was not entitled to weight as he did not have a full and accurate history, that appellant had been seen by him only once, and that her physicians' reports were overlooked. She further argued that, even with maximum medical improvement, she would be unable to effectively and safely do any job due to limitations of movement, pain, and strong pain killers which kept her from efficiently doing the most basic of tasks. Appellant also argued that working would aggravate her injury and pose a danger to herself and others.

By decision dated December 30, 2015, OWCP denied appellant's request for hearing as untimely filed. It also exercised its discretion and informed her that the issue in the case could equally well be addressed by a request for reconsideration.

On June 20, 2016 appellant requested reconsideration of the February 18, 2014 decision based on "reasonable color of validity." In an accompanying note dated June 17, 2016, she argued that she was 64 years old and that her surgeon had not released her to return to work until April 30, 2014. In an additional statement received by OWCP on June 21, 2016, appellant argued that the medical evidence in the record documented that her condition had worsened since the compensable injury, and that she was disabled.

OWCP continued to receive reports, dated from February 11, 2014 through October 12, 2015, from Dr. Graham F. Whitfield, an orthopedic surgeon and a colleague of Dr. Amro. In a February 11, 2014 report, Dr. Whitfield diagnosed arthralgia of the left shoulder with acromioclavicular joint arthralgia, biceps tendinitis, subacromial bursitis, supraspinatus, infraspinatus, subscapularis tendinitis, and cervical paraspinal muscle spasm. He discussed treatment options with appellant. In an October 12, 2015 report, Dr. Whitfield provided a permanent impairment rating of 12 percent of the left upper extremity. The record also includes multiple unsigned notes from by Dr. Amro. Finally, work capacity evaluations dated from March 10 through September 8, 2014 from Dr. Amro indicate that appellant could work full time with restrictions limited to three hours per day of standing and five hours a day of walking.

By decision dated July 7, 2016, OWCP denied appellant's reconsideration request as it was untimely filed and failed to demonstrate clear evidence of error.

LEGAL PRECEDENT

To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant's application for review must be received by OWCP within one year of the date of that decision.³ The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted OWCP under section 8128(a) of FECA.⁴ The one-year period begins on the date of the original decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues. This includes any hearing or review of the written record decision, any denial of modification following reconsideration, any merit decision by the Board, and any merit decision following action by the Board.⁵

OWCP, however, may not deny an application for review solely because the application was untimely filed. When an application for review is untimely filed, OWCP must nevertheless undertake a limited review to determine whether the application demonstrates clear evidence of error.⁶ OWCP's regulations and procedures provide that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607(a), if the claimant's application for review demonstrates clear evidence of error on the part of OWCP.⁷

To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.⁸ The evidence must be positive, precise, and explicit and must manifest on its face that OWCP committed an error.⁹ Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹⁰ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹¹ This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹² To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient

³ 20 C.F.R. § 10.607(a).

⁴ 5 U.S.C. § 8128(a); *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

⁵ *D.G.*, 59 ECAB 455 (2008); *see also C.J.*, Docket No. 12-1570 (issued January 16, 2013).

⁶ *See* 20 C.F.R. § 10.607(b); *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

⁷ 20 C.F.R. § 10.607(b); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.5 (February 2016).

⁸ *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

⁹ *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

¹⁰ *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

¹¹ *Supra* note 9.

¹² *See Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP decision.¹³

ANALYSIS

The Board finds that OWCP properly declined to reopen appellant's claim for reconsideration of the merits as her request for reconsideration was untimely filed and failed to demonstrate clear evidence of error.

As previously noted, the Board does not have jurisdiction over the last merit decision issued on February 18, 2014. The only decision over which the Board has jurisdiction is the July 7, 2016 nonmerit decision wherein OWCP denied reconsideration as appellant's request was untimely filed and failed to demonstrate clear evidence of error.¹⁴ As more than one year elapsed between the last merit decision issued on February 18, 2014 and appellant's June 20, 2016 request for reconsideration, the Board finds that appellant's request for reconsideration was untimely filed.¹⁵ As an untimely reconsideration request, appellant must demonstrate clear evidence of error by OWCP in order to receive a merit review of the claim.¹⁶

The Board finds that none of the evidence submitted since the last merit review demonstrates clear evidence of error. On February 18, 2014 OWCP terminated appellant's compensation after she failed to accept an offer of suitable employment. Appellant submitted reports of Dr. Whitfield and the work capacity evaluations of Dr. Amro. These reports, however, do not demonstrate clear error in as they do not establish that OWCP committed an error in denying appellant's claim, nor do they raise a substantial question as to the correctness of OWCP's decision.¹⁷

Furthermore, appellant's arguments on reconsideration failed to demonstrate clear evidence of error. She contends that she is entitled to review due to "color of validity" as noted in the procedure manual. Appellant appears to be referring to the section of the manual which indicates that, in timely applications for reconsideration, reopening the claim for further review on the merits is not required where "the legal contention does not have a reasonable color of validity."¹⁸ However, as previously noted, appellant did not file a timely request for reconsideration. The Board notes that clear evidence of error is intended to represent a difficult standard.¹⁹ Finally, appellant alleged that she could not work due to her age. However, the

¹³ *Leon D. Faidley, Jr., supra* note 4.

¹⁴ *See* 20 C.F.R. § 501.3(e); *see also R.R.*, Docket No. 14-151 (issued March 25, 2014).

¹⁵ 20 C.F.R. § 10.607(a).

¹⁶ *N.C.*, Docket No. 17/0157 (issued April 24, 2017).

¹⁷ *Supra* note 13.

¹⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations, Timely Applications*, Chapter 2.1602.6(a)(2) (October 2011).

¹⁹ *S.R.*, Docket No. 17-0271 (issued April 24, 2017).

intent of FECA is to return an injured employee to gainful employment; it is not a retirement program.²⁰

As the evidence presented by appellant since the last merit decision does not raise a substantial question concerning the correctness of OWCP's decision, OWCP properly determined that appellant did not demonstrate clear evidence of error in that decision.²¹

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 7, 2016 is affirmed.

Issued: July 7, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²⁰ *F.C.*, Docket No. 14-0560 (issued November 12, 2015).

²¹ *Supra* note 13.